No. 84-6811

IN THE

Supreme Court of the United States

October Term, 1984

WARREN McCLESKEY,

Petitioner,

against

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR THE CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO
FILE BRIEF AMICUS CURIAE

The Congressional Black Caucus respectfully moves this Court, pursuant to

Rule 36.1 of its Rules, for leave to file the attached brief amicus curiae in support of Warren McCleskey's petition for certiorari in this case. The consent of the petitioner has been obtained. Counsel for respondent, however, has declined our request for consent, necessitating this motion.

The Congressional Black Caucus ("the Caucus") is composed of all 20 black members of the United States House of Representatives. The primary function of the Caucus is to implement and preserve the constitutional guarantee of equal justice under the law for all Americans, particularly black Americans.

The Caucus requests leave to file a brief amicus curiae to make plain the troubling constitutional implications it finds in the opinion of the Court of Appeals, and the consequent importance to black citizens of the issues raised by the McCleskey v. Kemp case.

Warren McCleskey has presented substantial evidence that racial discrimination is at work in the capital punishment statutes of the State of Georgia. His claims, based primarily on the comprehensive studies of Professor David Baldus, are well-documented, and the State's contrary evidence appears insubstantial and unpersuasive.

We come before this Court, however, not to debate the merits of McCleskey's evidence, for the Court of Appeals itself did not decide against McCleskey by dismissing his factual case. Instead, it

explicitly accepted, for purposes of the appeal, the validity of the Baldus study, and assumed that McCleskey v. Kemp, 753 F.2d 877, 886 (11th Cir. 1985)(en banc) "proves what it claims to prove." Id. Even so, the Court of Appeals reasoned that petitioner has stated no claim under the Eighth or Fourteenth Amendments.

It is this extraordinary constitutional ruling that prompts our intervention as amicus curiae. Even while acknowledging substantial disparities by race in Georgia's death sentencing rates -- approaching twenty percentage points in the midrange of homicide cases -- and an overall average racial disparity exceeding six percentage points, the Court of Appeals holds that Eighth and Fourteenth Amendments are unaffected.

If this troubling opinion goes unreviewed, fundamental constitutional issues

long ago settled in this nation will once again be open to serious question. It is cause enough for grave concern if the pattern of executions now being carried out in this country is infected by racial discrimination. Yet if a federal court may announce that such discrimination makes no legal difference, if it holds that such a pattern affronts no constitutional principles, the time has come, the Caucus believes, for this Court to be heard.

As the ultimate guardian of our constitutional values, this Court cannot afford to overlook a pronouncement, by a majority of the United States Court of Appeals for the Eleventh Circuit sitting en banc, that appears to condone some measure of racial discrimination in capital sentencing. This Court has noted that "Georgia may not attach the 'aggra-

vating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as ... race." Zant v. Stephens (II) 462 U.S. 862, 885 (1983). Yet the McCleskey opinion threatens to give de facto sanction to just such a practice. The Caucus, one of whose principal aims is to ensure that equal justice under law remains a reality for all citizens, respectfully requests leave to file this brief amicus amicus to address these important issues.

Dated: June 28, 1985

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE BLACK LEGISLATIVE CAUCUS

SUMMARY OF ARGUMENT

The Court of Appeals, for purpose of Warren McCleskey's appeal, has accepted the validity of his statistical evidence

demonstrating (i) that black defendants, or those whose victims are white, are substantially more likely to receive death sentences in the State of Georgia than are white defendants, or those whose victims are black; and (ii) that these record disparities are not explained by any of over 230 other legitimate sentencing factors. Despite this overwhelming proof that race plays a part Georgia's capital sentencing system, the Court of Appeals had held that neither the Eighth nor the Fourteenth Amendments are implicated, apparently because it finds the magnitude of the racial influence to be relatively minor. Viewed as a statement of legal principle, this opinion by the Court of Appeals is astonishing; it turns its back on a consistent, hundred-year history of interpretation of the Equal Protection Clause. Viewed as a statement of fact, the opinion is equally deficient. It

misunderstands the true magnitude and importance of the statistical results reported in the Baldus studies. Under any analysis, the opinion deserves review by this Court.

ARGUMENT

NEITHER THE EIGHTH AMENDMENT NOR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT ALLOW COURTS OR JURIES SYSTEMATICALLY TO PUNISH BLACK DEFENDANTS, OR THOSE WHOSE VICTIMS ARE WHITE, MORE SEVERELY FOR SIMILAR CRIMES THAN WHITE DEFENDANTS, OR THOSE WHOSE VICTIMS ARE BLACK

The Baldus studies examine the disposition by Georgia's criminal justice system of a wide range of homicides committed over a seven-year period from 1973 through 1979. Baldus and his colleagues collected data from official state files on over 500 items of information for each case, providing a comprehensive picture of the crimes, the defen-

dants, the victims, and the strength of the State's evidence. After employing a variety of accepted social scientific methods to analyze his data -- each of which the Court of Appeals assumed to be valid for purposes of McCleskey's appeal -- Baldus reported that "systematic and substantial disparities exist in the penalties imposed upon homicide defendants in the State of Georgia based upon the race of the homicide victim," (Fed. Hab. Tr. 726-27) (Professor Baldus), and to a slightly lesser extent, "upon the race of the defendant." (Id.) Baldus found no "legitimate factors not controlled for in [his] analyses which could plausibly explain the persistence of these racial disparities." (Id. 728).

In short, the Baldus studies conclude that race continues to play a real, systematic role in determining who will receive life sentences and who will be

executed in the State of Georgia. By assuming the truth of those conclusions, the Court of Appeals has sharply focused the underlying constitutional issue on this appeal: does proven racial discrimination in capital sentencing violate the Eighth or Fourteenth Amendments. The astonishing answer of the Court of Appeals is that it does not.

The Court does take issue with the Baldus studies on the exact magnitude of the racial effect -- whether it is nearer six percentage points or twenty points. See McCleskey v. Kemp, 753 F.2d 877, 896-98 (11th Cir. 1985)(en banc). That question, however, seems plainly beside the point. The Black Caucus has long understood that unequal enforcement of criminal statutes based upon racial considerations violates the Fourteenth Amendment. Such distinctions, whatever their magnitude, have "no legitimate

overriding purpose independent of invidious racial discrimination ... [justifying] the classification," Loving v. Virginia, 388 U.S. 1, 11 (1967); Yick Wo v. Hopkins, 118 U.S. 356 (1886); cf. Furman v. Georgia, 408 U.S. 238, 389 n.12 (Burger, C.J., dissenting).

One of the chief aims of the Equal Protection Clause was to eliminate of discrimination against black defendants and black victims of crime. See General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 382-91 (1982); Briscoe v. LaHue, 460 U.S. 325, 337-40 (1983). Indeed, for well over 100 years, this Court has consistently interpreted the Equal Protection Clause to prohibit racial discrimination in the administration of the criminal justice system. See, e.g., Strauder v. West Virginia, 100 U.S. 303 (1880); Carter v. Texas, 177 U.S. 442 (1900); Norris v. Alabama, 294 U.S. 587

(1935); Avery v. Georgia, 345 U.S. 559 (1953); Turner v. Fouche, 396 U.S. 346 (1970); Rose v. Mitchell, 443 U.S. 545 (1979). While questions concerning the necessary quantum of proof have occasionally proven perplexing, no federal court until now has ever, to our knowledge, seriously suggested that racial discrimination at any level of magnitude, if clearly proven, can be constitutionally tolerated. Yet that is precisely the holding of the Court of Appeals.

Moreover, even if the magnitude of discrimination were a relevant constitutional consideration, Warren McCleskey's evidence has demonstrated an extraordinary racial effect. The increased likelihood of a death sentence if the homicide victim is white, for example, is .06, or six percentage points, holding all other factors constant. Since the average death-sentence rate among Georgia cases is

only .05, the fact that a homicide victim is white, rather than black, increases the average likelihood of a death sentence by 120%, from .05 to .11. The suggestion of the Court of Appeals that race affects at most a "small percentage of the cases," McCleskey v. Kemp, supra, 753 F.2d at 899, scarcely does justice to these figures.

In plainest terms, these percentages suggest that, among every 100 homicides cases in Georgia, 5 would receive a death sentence if race were not a factor; in reality, where white victims are involved, 11 out of 100 do. Six defendants are sentenced to death with no independent explanation other than the race of their victims.

Furthermore, the racial disparities are far more egregious among those cases where death sentences are most frequently imposed. Baldus' studies demonstrate that, among the midrange of cases, the

race of victim has a .20, or twenty percentage point impact in addition to every other factor considered. Such results simply are intolerable under our Constitution, especially when the stakes are life and death.

We are tempted to believe that the Court of Appeals' opinion reflects, in part, less a conscious decision to tolerate racial discrimination than a sense that the Baldus studies are not sufficiently reliable. However, accepted at face value as the Court announces it has done, the Baldus studies account for over 230 non-racial variables, and far exceed any reasonable prima facie standard of proof ever announced by this Court. See generally, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Hazelwood School District v. United States, 433 U.S. 299 (1977); Castaneda v. Partida, 430 U.S. 482 (1977).

The practical effect of the McCleskey holding, therefore, will be to declare that capital punishment may be imposed and carried out throughout the states of the Eleventh Circuit -- Georgia, Florida, and Alabama -- even if race continues to influence sentencing decisions in those states. We strongly urge the Court to grant certiorari to review the opinion of the Court of Appeals

CONCLUSION

The petition for certiorari should be granted.

Dated: June 28, 1985

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, and that I served the annexed Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae on the parties by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

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Done this 28 th day of June, 1985.

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